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WEST VIRGINIA MARRIAGE LAW

CLYDE L. COLSON*

I. THE NATURE OF MARRIAGE

In order to avoid possible confusion, it is well to bear in mind that the term "marriage" is used in two senses. In one sense it means simply the relation of husband and wife. So defined, marriage is a status, the rights and obligations of which are determined by law. On the other hand, "marriage" is often used to mean the act, whether by formal ceremony or otherwise, by which the status of husband and wife is established. In this sense marriage may properly be spoken of and dealt with as a contract.¹

To say, however, that marriage is in one sense a contract is not to say that even in its contractual aspect it is governed entirely by general contract principles. On the contrary, it should be noted that the contract of marriage differs from an ordinary contract in several particulars. For instance, the marriage contract of an infant, if he be above the age of consent, is not voidable.² Again, in states which do not recognize informal or common-law marriages, strict requirements as to form must be satisfied before there is a valid marriage.³ There is the further difference that in general it takes more fraud to make a marriage voidable than is necessary in the case of other contracts.⁴ All of this, however, does not prove that the marriage contract is truly no contract at all, as some would have us believe,⁵ but proves rather that it is a specialized type of contract governed by rules peculiarly its own.

There is a tendency to enlarge the concept of marriage as a contract so as to include not only the marriage contract itself,

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¹ But cf. MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) § 3, where he says, "Marriage, in the sense of the act by which parties become husband and wife, has been called a contract, but strictly speaking it is not so." In the same section, Note 4, however, he does violence to his own definition by saying that "The contract of marriage being a civil contract, the rules to be applied thereto must be, to a great extent, the same as are applied to other contracts." (Italics ours.) The whole matter is, of course, simply one of terminology, and since confusion may be avoided by recognizing the two senses in which the term "marriage" is used, there would seem to be no sufficient reason for our refusal to follow the established usage in this connection.

² *Infra* at 42.

³ *Infra* at 35.

⁴ *Infra* at 44.

⁵ MADDEN, *op. cit. supra* n. 1, at 4. Cf. PECK, DOMESTIC RELATIONS (3d ed. 1930) 129-131.

where the concept is properly applicable, but also to include the status or relationship of marriage, where it is wholly inapplicable. Such danger of confusion, however, as is present in this tendency is obviated merely by keeping in mind the dual nature of marriage. In other words, one should remember that marriage in its relational sense is simply the status of husband and wife, and that this status is established by contract of the parties. Thus attention is called to the contractual as well as to the relational aspect of marriage.

That marriage has this dual aspect is recognized by the West Virginia court:

“The status of marriage has its inception in contract, and its validity depends largely upon the validity of the contract upon which it is based.”⁶

In considering the problem of annulment, our attention will be directed almost wholly to the question whether the marriage contract is valid. In view of this fact, far from being objectionable, it would seem to be of positive advantage to recognize that in one sense marriage is contractual.

II. REQUISITES FOR A VALID MARRIAGE

A. In General

Briefly stated, in order for there to be a valid marriage in West Virginia there must be a formal ceremony in compliance with the statutory provisions, an expression of mutual consent to the assumption of the relation, which assent must be given by parties who are capable of expressing an intelligent consent and who are also legally capable of entering into the marriage relationship. These various requirements will be considered separately, though not necessarily in the order stated, all except the first being dealt with in connection with the specific grounds for annulment.

B. Formal Requisites

According to the view taken by more than half the states no formal ceremony is necessary to the creation of a valid marriage. In such states an informal expression of mutual assent is sufficient, the statutes setting forth a formal procedure for the celebration of

⁶ *Crouch v. Wartenberg*, 86 W. Va. 664, syl. 2, 104 S. E. 117 (1920). See also same case, 91 W. Va. 91, 94-95, 112 S. E. 234 (1922); *Kester v. Kester*, 106 W. Va. 615, 620, 146 S. E. 625 (1929).

marriage being construed to be directory only. The prevailing opinion is that these statutes should not be taken as mandatory in the absence of express language making invalid marriages celebrated in any other manner.⁷

West Virginia, however, refuses to recognize informal or common-law marriages contracted in this state. In order to have a valid marriage here there must be a formal religious ceremony. It should be noted that although under our statute duly qualified ministers are the only persons who may properly perform the ceremony,⁸ it is expressly provided that marriages solemnized by an unauthorized person are nevertheless valid if either or both of the parties being married should in good faith believe him qualified.⁹

The decision that informal or common-law marriages in this state are invalid was reached despite the fact that our statute does not expressly declare such marriages void. In *Beverlin v. Beverlin* the court said:

"We think our statute has wholly superseded the common law and in effect, if not in express terms, renders invalid all attempted marriages contracted in this State which have not been solemnized in substantial compliance with its provisions."¹⁰

Although recognizing that such statutes "have generally and properly been construed as directory and not mandatory",¹¹ the court concluded that the proviso that some marriages where there had been a failure to comply with the statute were not to be "deemed or adjudged void", was equivalent to an express provision that all other marriages not in compliance with the statute were to be treated as void.

As an original proposition one might question the necessity of this conclusion. Except as an exercise in logic, however, it would be both pointless and unprofitable to do so at the present time. The law is too well established that there must be a formal religious ceremony. But it is interesting to speculate whether the court

⁷ See MADDEN, *op. cit. supra* n. 1, §§ 20-22 for collection of authorities and general discussion of informal or common-law marriages.

⁸ W. VA. REV. CODE (1931) c. 48, art. 1, § 12.

⁹ W. VA. REV. CODE (1931) c. 48, art. 1, § 15.

¹⁰ 29 W. Va. 732, 737, 3 S. E. 36 (1887). See also *In re Meade's Estate*, 82 W. Va. 650, 655, 97 S. E. 127 (1918); *Jackson v. Commissioner*, 106 W. Va. 374, 145 S. E. 753 (1928); *Kester v. Kester*, 106 W. Va. 615, 146 S. E. 625 (1929); *Fout v. Hanlin*, 113 W. Va. 752, 169 S. E. 743 (1933).

¹¹ *Beverlin v. Beverlin*, 29 W. Va. 732, 738, 3 S. E. 36 (1887).

would follow the same line of reasoning in dealing with other provisions of the statute.

Starting with the proposition that our marriage statute is mandatory, there is the further question whether it is mandatory in every detail. The rule in most other states is that although the statute is construed to be mandatory, it is so only as to the requirement of a formal marriage ceremony.¹² Other provisions such as those which require that a license be obtained or that the consent of parents be given are held to be only directory unless there is express language to the contrary. Thus in Maryland, a state which like West Virginia refuses to recognize common-law marriages,¹³ although the statute provides that no persons "shall be joined in marriage until a license shall have been obtained", it was held that a marriage performed without a license was nevertheless valid.¹⁴ The court of North Carolina has reached a similar result.¹⁵

On the other hand, though there is no definite holding on the point, there is at least a dictum that the West Virginia statute is mandatory not only in its requirement of a formal ceremony but also in its requirement of a license. Our statute provides that

"Every marriage in this state shall be under a license and solemnized as provided in this article."¹⁶

Construing a similar provision of the Virginia statute, in a case where there was neither a license nor a formal ceremony, the Virginia court said that the statute was mandatory in respect to both these requirements.¹⁷ In a West Virginia case, where there was also no evidence of a marriage ceremony, this Virginia case was cited with approval, the court saying that

"In order to [have] a valid marriage under the laws of this state there must have been performed what is ordinarily known as a ceremonial marriage, that is, the law requiring the issuance of a license and the performance of a ceremony by one authorized thereto must be complied with."¹⁸

¹² MADDEN, *op. cit. supra* n. 1, § 64.

¹³ Denison v. Denison, 35 Md. 361 (1871).

¹⁴ Feehley v. Feehley, 129 Md. 565, 99 Atl. 663, L. R. A. 1917C, 1017 (1916).

¹⁵ Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628 (1922).

¹⁶ W. VA. REV. CODE (1931) c. 48, art. 1, § 5.

¹⁷ Offield v. Davis, 100 Va. 250, 263, 40 S. E. 910 (1902).

¹⁸ *In re Meade's Estate*, 82 W. Va. 650, 655, 97 S. E. 127 (1918). See also *Kester v. Kester*, 106 W. Va. 615, 617-618, 146 S. E. 625 (1929) (question as to legitimacy of children, the court saying that even if the marriage statute

Despite this clear language, one hesitates to say that a license is absolutely necessary in this state. In neither of these cases was the question squarely before the court. To raise the point it would be necessary to have a case in which admittedly there had been compliance with all statutory provisions except the one requiring a license. Then the only question would be whether the statute was mandatory in its requirements that a license be obtained. Should the problem be thus presented, it is believed that the court itself would hesitate to declare the marriage void. It should be noted, however, that if the court followed the line of reasoning used in the *Beverlin* case, it would have to hold the marriage invalid.

Assume for a moment that it is necessary to have a license before there can be a valid marriage in this state. Immediately other difficult questions arise. Our statute provides that the license shall be issued in the county where "the female to be married usually resides".¹⁹ Suppose that a license is obtained, but in the wrong county. Would a marriage performed under this license be invalid? And if not, why not? If it should be held that the legislative requirement of a license is mandatory, would it not be equally reasonable to hold that the license required is one issued in compliance with the statute? Again, the statute provides that if the applicant for a license be under the age of twenty-one and has not been previously married, the consent of parents or guardian must be obtained.²⁰ Suppose that a license is issued without such consent, would a marriage under that license be void? In a Virginia case where this question was raised the court held that the marriage was valid.²¹ It should be noted, however, that after the decision in *Offield v. Davis*,²² the Virginia legislature, anticipating the problems just raised, expressly enacted that no marriage should be invalid by reason either of defects in the license or lack of authority on the part of the one issuing the license.²³

It would be more difficult for the West Virginia court to uphold a marriage performed under a defective license. Although our statute makes valid all marriages solemnized by one not authorized to perform the ceremony if the parties married or one of

was not complied with, there was at least a common-law marriage, the issue of which was made legitimate by statute); *Trent v. State Compensation Commissioner*, 113 W. Va. 262, 167 S. E. 623 (1932).

¹⁹ W. VA. REV. CODE (1931) c. 48, art. 1, § 6.

²⁰ W. VA. REV. CODE (1931) c. 48, art. 1, § 8.

²¹ *Stanley v. Rasnick*, 137 Va. 415, 426, 119 S. E. 76 (1923).

²² 100 Va. 250, 263, 40 S. E. 910 (1902).

²³ VA. CODE ANN. (Michie, 1930) § 5082.

them believes in good faith that he is authorized, it makes no provision for irregularities in regard to the license.²⁴ If we should apply the same reasoning used in the *Beverlin* case, it would be easy to find by implication a provision that all marriages affected by some irregularity, which were not expressly made valid, were to be treated as void.

It is not believed, however, that our court would hold a marriage void merely because of some defect in the license. Such a decision would entail unfortunate results. There are normally two considerations which should make courts reluctant to declare a marriage void. One is the danger of bastardizing the issue of the marriage, and the other is the danger of disturbing titles acquired on the assumption that the marriage was valid. Although the first consideration is without weight in this state because the children of void marriages are expressly made legitimate by statute,²⁵ the threat to the security of titles is of real consequence. In this connection two things should be borne in mind. First, it should be noted that a void marriage may be collaterally attacked in any proceeding, whereas a voidable marriage may be questioned only in a direct proceeding instituted for that purpose²⁶ during the lifetime of the parties to the marriage.²⁷ In the second place, most of these collateral attacks are made after the death of the husband to prevent the widow from sharing in his estate, and there would seem to be no reason why the attack might not also be made long after she has been given her share of the property. If this reasoning is sound, and if such collateral attacks would be successful merely on a showing that there was no license or that the license had been improperly issued, it would necessarily follow that title to much property in this state would be rendered insecure. There must have been many cases in which the license was issued in the wrong county or in which by reason of a false statement of age by the applicant the license was obtained without the consent of parents or guardian. Faced with the prospect of invalidating numerous existing marriages and of thereby disturbing the security of titles, it is confidently believed that the court would refuse to allow the collateral attack in such a case.

²⁴ W. VA. REV. CODE (1931) c. 48, art. 1, § 15.

²⁵ W. VA. REV. CODE (1931) c. 42, art. 1, § 7. See *Kester v. Kester*, 106 W. Va. 615, 617-618, 146 S. E. 625 (1929) where this section was applied.

²⁶ *Hall v. Baylous*, 109 W. Va. 1, 2, 153 S. E. 293 (1930).

²⁷ *Hastings v. Douglass*, 249 Fed. 378, 383 (1918). But see *infra* at 50.

To reach that result it would have to hold our marriage statute directory at least in respect to the provisions dealing with the county in which the license should be issued and with the necessity for the consent of parents or guardian. Further, in view of the fact that it would not be logically consistent to hold those provisions directory, and yet to hold mandatory the provision that there must be a license, it is hoped that the court, when presented with the problem, will follow the prevailing view and hold that our statute is mandatory only in so far as it requires a formal religious ceremony.

Such a decision should not be hard to reach in light of these additional considerations. In the first place, the license requirement is largely a regulation in furtherance of the legislative policy that the so-called vital statistics of birth, marriage and death be made matters of public record. It would seem that this policy is sufficiently safeguarded by those provisions of the statute which punish not only the clerk who improperly issues the license,²⁸ but also the person who performs the ceremony without a license.²⁹ There appears to be no necessity for penalizing the parties to the marriage. In fact it may well be argued that by imposing the penalties mentioned above, the legislature has shown an intention that no other penalties be imposed. This argument is fortified by the further consideration that the legislative policy of this state is clearly against having marriages declared void in collateral proceedings.³⁰ This is shown by the fact that many marriages which would have been void at common law have been expressly made voidable and thus subject to attack only in annulment proceedings.³¹

The Maryland court in sustaining the general argument just advanced used language which would seem to apply as well to West Virginia:

"The regulative purposes of the license statute are useful and important, but they are sought to be enforced by pecuniary penalties pronounced against those officiating at unlicensed marriages, and not by the radical process of rendering void and immoral a matrimonial union otherwise validly contracted and solemnized. . . . The principle that such pro-

²⁸ W. VA. REV. CODE (1931) c. 48, art. 1, § 20.

²⁹ W. VA. REV. CODE (1931) c. 48, art. 1, § 21.

³⁰ See Judge Maxwell's dissent in *Hall v. Baylous*, 109 W. Va. 1, 12-13, 153 S. E. 293 (1930).

³¹ W. VA. REV. CODE (1931) c. 48, art. 1, §§ 1 and 2. But see *infra* at 50.

visions are directory only, has been adopted in jurisdictions where a religious ceremony is not regarded as an essential element of a marriage according to the common law, and it would seem that in a State like our own, where this additional sanction and safeguard is required, there is even stronger reason for the rule that the validity of such a marriage should be sustained."³²

Before leaving this problem it should be pointed out that if a marriage is questioned, there is a presumption in favor of its validity.³³ If the parties to the marriage have lived together as husband and wife and have generally been recognized as such, the natural presumption is that they must have been legally married. As was said by the West Virginia court, in a case where no marriage had been directly proved,

"... circumstances, conduct of the parties, cohabitation apparently matrimonial, and general marital repute, so establish a presumption that a legal marriage existed between the parties, that it must be taken as true since there is not a word to rebut it."³⁴

In the absence of evidence to the contrary this presumption is sufficient to uphold the validity of the marriage, but being only a presumption of fact, it is of course subject to rebuttal, as was intimated by the court.³⁵

Although informal marriages in this state are void, it does not follow that they are wholly without legal effect. They are accorded a limited recognition under our statute declaring legitimate the issue of void marriages.³⁶ It is settled that under this statute the issue of an informal marriage is legitimate.³⁷ There remains, however, the question whether the parties have contracted a good common-law marriage. In a recent case, which outlines the re-

³² *Feehley v. Feehley*, 129 Md. 565, 570-571, 99 Atl. 663 (1916).

³³ W. VA. REV. CODE (1931) c. 48, art. 2, § 2. After providing for suits to affirm or annul marriages there is the further provision that "In every such case, and in every other case where the validity of a marriage is called in question, it shall be presumed that the marriage is valid, unless the contrary be clearly proven. . . ." It should be noted that this applies both to direct and collateral attacks on a marriage. For a general discussion of this presumption see MADDEN, *op. cit. supra* n. 1, § 24.

³⁴ *Miller v. Miller*, 76 W. Va. 352, 353, 85 S. E. 542 (1915). *Accord*: *Suter v. Suter*, 68 W. Va. 690, 693-694, 70 S. E. 705 (1911).

³⁵ *In re Meade's Estate*, 82 W. Va. 650, 656, 97 S. E. 127 (1918); *Hall v. Baylous*, 109 W. Va. 1, 9-10, 153 S. E. 293 (1930).

³⁶ W. VA. REV. CODE (1931) c. 42, art. 1, § 7.

³⁷ *Kester v. Kester*, 106 W. Va. 615, 146 S. E. 625 (1929).

quirements for a common-law marriage, the children were held illegitimate because these requirements had not been satisfied.³⁸

Except for the purpose of making the children legitimate our court refuses to recognize a common-law marriage contracted in this state, but it will recognize a common-law marriage contracted in another state where such marriages are valid.³⁹ This is but an illustration of the general conflict of laws principle that a contract valid where made will be recognized as valid in other states unless to do so would run counter to some strong policy of the forum. A policy of this sort is involved in the case where a marriage is contracted in another state by residents of West Virginia with the express purpose of evading the law of this state. In such case, not only will our court refuse to recognize the validity of the marriage, but by statute may entertain a suit for its annulment.⁴⁰

III. ANNULMENT

In the beginning, it should be noted that although many of the marriages which may be annulled in this state were at common law wholly void so that no decree of annulment was necessary, our statute has made all such prohibited marriages voidable only. This means that they are to be treated as valid until a decree of annulment has been entered.⁴¹

The circuit court, on the chancery side, has sole jurisdiction of suits to annul or affirm marriages.⁴² As a general rule such suit may be brought only when one of the parties is at the commencement of the suit a *bona fide* resident of this state. There is, however, one exception to this rule. Although both parties are non-residents, if the marriage was contracted here and no matrimonial

³⁸ Fout v. Hanlin, 113 W. Va. 752, 169 S. E. 743 (1933).

³⁹ Jackson v. Compensation Commissioner, 106 W. Va. 374, 145 S. E. 753 (1928). See also Miller v. Miller, 76 W. Va. 352, 355, 85 S. E. 542 (1915); Perkey v. Perkey, 87 W. Va. 656, 658, 106 S. E. 40 (1921).

⁴⁰ W. VA. REV. CODE (1931) c. 48, art. 1, § 17. Martin v. Martin, 54 W. Va. 301, 302, 46 S. E. 120 (1903) (Pennsylvania marriage between nephew and aunt was annulled upon showing that the parties were married there to evade the laws of this state). And see Perkey v. Perkey, *supra* n. 39, where although it was held that this statute did not apply because it was not alleged that the marriage was contracted in another state to evade the West Virginia laws, there was a clear intimation that had this been the case the marriage would have been annulled.

⁴¹ W. VA. REV. CODE (1931) c. 48, art. 2, § 1.

⁴² W. VA. REV. CODE (1931) c. 48, art. 2, § 6.

domicile has been established elsewhere, the marriage may be annulled in this state.⁴³

A. *Specific Grounds for Annulment*

(1) *Marriage below the age of consent.* It has already been pointed out that a marriage is not valid unless the parties are legally capable of giving an intelligent consent. At common law the age at which such consent could be given was fourteen for boys and twelve for girls. The common-law ages of consent, however, have been raised by statute in West Virginia to eighteen and sixteen respectively.⁴⁴

A marriage contracted by parties above the age of consent is binding. Even though one of the parties may not have reached majority, his marriage contract unlike his other contracts may not be avoided on the ground of infancy.⁴⁵ On the other hand, at common law the marriage of one who is less than seven years old is void, while the marriage of one over seven but under the age of consent is only voidable.

It is not clear what the law of West Virginia would be in respect to the marriage of one less than seven years old. In *Perkey v. Perkey*, the court said:

"At common law the age of consent of the female was twelve years, that of the male fourteen years, but marriages under those ages and over seven were not regarded void, but voidable only . . . Statutes like ours were not intended to do more than raise the ages of consent, leaving the rules of common law in all other respects unimpaired and in full force."⁴⁶

But in view of our statutory provision that "all marriages solemnized when either of the parties . . . was under the age of consent" shall be voidable,⁴⁷ query whether a marriage under the age of seven is void or only voidable.

However that may be, there is no doubt that in the normal

⁴³ W. VA. REV. CODE (1931) c. 48, art. 2, § 7. See *Titus v. Titus*, 115 W. Va. 229, 174 S. E. 874 (1934) (annulling a marriage contracted in this state by residents of Pennsylvania). Note that by statutory provision, W. VA. REV. CODE (1931) c. 48, art. 2, § 9, the venue of annulment and divorce actions is the same. This being true, the question of venue has been left for detailed consideration in a subsequent article which will deal with the divorce law of West Virginia.

⁴⁴ W. VA. REV. CODE (1931) c. 48, art. 1, § 1.

⁴⁵ *Flint v. Gilpin*, 29 W. Va. 740, 742, 3 S. E. 33 (1887) (dictum). And see MADDEN, *op. cit. supra* n. 1, § 13.

⁴⁶ *Perkey v. Perkey*, 87 W. Va. 656, 659, 106 S. E. 40 (1921).

⁴⁷ W. VA. REV. CODE (1931) c. 48, art. 2, § 1.

case marriages under the age of consent are voidable only and are valid until entry of a decree of nullity.⁴⁸ If but one of the parties is below the age of consent, he alone may sue to annul the marriage, and even he may lose this right by affirming the marriage after he reaches the age of consent.⁴⁹

(2) *Insanity and intoxication.* Our statute explicitly makes voidable marriages solemnized when either of the parties was incapable of expressing an intelligent consent because of his mental condition.⁵⁰ Note that only an incapacity existing at the time when the marriage was contracted is made ground for annulment, neither prior nor subsequent incapacity being sufficient. In view of the clarity of the statute it is not surprising that no case could be found expressly holding that insanity or similar incapacity was ground for annulment. But there is one case in which the marriage was attacked in a federal court after the death of the insane party. Applying our statute which makes such marriages void only after entry of a decree of nullity, the court refused to allow the collateral attack and held that the marriage could be questioned only in a direct proceeding to annul or affirm it during the lifetime of the parties.⁵¹

The marriage of a mentally incompetent person is voidable simply because of a lack of consent on his part. For the same reason, when one of the parties is so intoxicated as to be unable to express an intelligent consent, most courts hold that the marriage is voidable.⁵² Although there seem to be no West Virginia cases on the point, there is reason to suppose that the court would follow the accepted rule should this question come before it. Our legislature has impliedly recognized that as a general proposition lack of consent on the part of one of the parties is ground for annulment. Such recognition is implicit in the provision that no suit to annul a marriage may be brought "where the cause is lack of consent on the part of either of the parties, by the party consenting or bringing about the marriage."⁵³ It also seems safe to predict

⁴⁸ *Perkey v. Perkey*, 87 W. Va. 656, 658, 106 S. E. 40 (1921).

⁴⁹ W. VA. REV. CODE (1931) c. 48, art. 2, § 3(d). To the effect that either party could annul such marriage at common law, see *MADDEN, op. cit. supra* n. 1, at 31.

⁵⁰ W. VA. REV. CODE (1931) c. 48, art. 2, § 1. Such mental deficiency may be either insanity, feeble-mindedness, idiocy or imbecility.

⁵¹ *Hastings v. Douglass*, 249 Fed. 378 (1918).

⁵² *MADDEN, op. cit. supra* n. 1, at 27-28 and authorities there cited.

⁵³ W. VA. REV. CODE (1931) c. 48, art. 2, § 3(e). And see *infra* at 45, where lack of consent was due to the fact that the marriage was contracted in jest.

that our court would hold that marriages, which are voidable because of a lack of consent due to the mental condition of one of the parties, may be ratified after removal of the disability.⁵⁴

(3) *Fraud and duress.* Another example of a marriage voidable because the requisite mutual assent is lacking is one in which the consent of one of the parties is obtained by fraud. In a case where the court held sufficient on demurrer a bill alleging that the plaintiff was induced by fraud to go through with the marriage ceremony, it was said:

"As the fraudulent representations or conduct of either party, when proved, vitiate a contract, whatever the subject of the negotiations may be, so such representations and conduct have the same force and effect upon the validity of a contract of marriage; certainly so if not consummated, and perhaps also even after its consummation, unless the plaintiff has in some manner waived the fraud. . . ."⁵⁵

That the rule would be the same when the consent was obtained by duress is shown by the statutory provision that no annulment suit may be brought,

"Where the cause is fraud, force or coercion, by the party who was guilty of such fraud, force or coercion, nor by the injured party if, after knowledge of the facts, he or she has by acts or conduct confirmed such marriage. . . ."⁵⁶

According to the generally accepted view the fraud which is sufficient to vitiate a marriage contract must be of a serious nature.⁵⁷ Each case must of course be decided on its own facts, and interesting differences of opinion exist as to whether particular fraudulent conduct is sufficient ground for annulment. Courts have differed on the questions whether concealment of pregnancy by another, or concealment of prior unchastity or other misconduct is such fraud as to make the marriage voidable. That there are no West Virginia cases on these questions is probably due to the fact that the matters are expressly covered by our statute. It is not even necessary to place the suit on the ground of fraud since the statute provides that,

". . . all marriages solemnized when either of the parties, prior to the marriage, without the knowledge of the

⁵⁴ See W. VA. REV. CODE (1931) c. 48, art. 2, § 3 and Reviser's Note dealing with the matter of confirmation.

⁵⁵ *Crouch v. Wartenberg*, 86 W. Va. 664, 668-669, 104 S. E. 117 (1920).

⁵⁶ W. VA. REV. CODE (1931) c. 48, art. 2, § 3(b).

other, had been convicted of an infamous offense, or when, at the time of marriage, the wife, without the knowledge of the husband, was with child by some person other than the husband, or prior to such marriage had been, without the knowledge of the husband, notoriously a prostitute, or when, prior to such marriage, the husband without the knowledge of the wife, had been notoriously a licentious person; shall be void from the time they are so declared by a decree of nullity."⁵⁷

In all these cases the right to annulment is lost if after learning the facts the injured party confirms the marriage.⁵⁹

Although these statutory provisions cover the matters which are normally dealt with in other states as fraudulent concealments, and although the situations outlined would seem to include numerically the bulk of cases in which fraud has been used as the basis for annulment, it by no means follows that other fraudulent concealments and misrepresentations may not be ground for annulment in West Virginia. On the contrary, in the language quoted above the court clearly intimates that any fraud sufficient to negative the existence of real consent will vitiate the marriage contract.

(4) *Marriage in jest*. Still another example of a marriage which is invalid because of a lack of the requisite mutual assent is to be found in the case where the parties have gone through with the marriage ceremony in a spirit of jest and with no real consent by either party to the establishment of the relation of husband and wife. In such a case the West Virginia court said:

"... mutual consent and bona fide agreement of the parties, freely given and with the intention of entering into a valid status of marriage, are fundamental and essential elements, and without them the marriage is invalid. . . .

"As neither plaintiff nor defendant . . . gave their [*sic*] free and willing consent to be bound by the ceremony, or assume towards each other the relation ordinarily implied in its performance, . . . and have not since done any act . . . indicating a purpose so to be bound, there appears no reason for refusing to order the annulment of the pretended marriage. . . ."⁶⁰

If only one of the parties thinks that the ceremony is performed in jest and the other has a secret intention to be bound,

⁵⁷ MADDEN, *op. cit. supra* n. 1, at 9-22.

⁵⁸ W. VA. REV. CODE (1931) c. 48, art. 2, § 1.

⁵⁹ W. VA. REV. CODE (1931) c. 48, art. 2, § 3(f, g, h).

⁶⁰ *Crouch v. Wartenberg*, 86 W. Va. 664, 667-668, 104 S. E. 117, 11 A. L. E. 212 (1920); *Accord: Id.* 91 W. Va. 91, 112 S. E. 234 (1922); *Meredith v. Shakespeare*, 96 W. Va. 229, 122 S. E. 520 (1924).

it would probably be necessary to base the action for annulment on the ground of fraud.⁶¹ On the other hand, if at the time of the marriage both parties understand that the whole matter is a joke, the fact that one of the parties subsequently changes his mind and decides to be bound by the contract will not deprive the other party of his right to an annulment.⁶²

It should be noted that our statute nowhere specifically makes voidable a marriage contracted in jest. The court in these cases placed its decision on the "inherent jurisdiction and power of a court of equity with respect to all civil contracts, voidable upon any ground cognizable by such courts."⁶³ The court also intimates that other grounds not mentioned, such as mistake, might be basis for annulling a marriage.⁶⁴

Although the inference is clear that marriages contracted in jest are voidable, which would accord with the general legislative policy of making all invalid marriages voidable only, the court later expressly declared that such a marriage was void *ab initio*.⁶⁵

(5) *Relationship*. In order to have a valid marriage, not only must there be an expression of mutual consent by parties capable of expressing an intelligent consent, but it is also necessary that the parties be not otherwise legally incapable of contracting marriage.⁶⁶ So far we have considered only cases in which the marriage was voidable because one or both of the parties could not give an intelligent consent or because there was in fact no real consent. We turn now to cases in which the marriage is voidable because of some other disability making it illegal for the parties to marry. The first such disability to be considered is kinship by blood or marriage within prohibited degrees of relationship.

⁶¹ This was the alternative ground in the first case of *Crouch v. Wartenberg*, *supra* n. 60.

⁶² *Meredith v. Shakespeare*, 96 W. Va. 229, 244-245, 122 S. E. 520 (1924).

⁶³ *Id.* at 230. If statutory authority is thought necessary, it might be inferred from W. VA. REV. CODE (1931) c. 48, art. 2, § 3(e).

⁶⁴ *Id.* at 245-246.

⁶⁵ *Meredith v. Shakespeare*, 97 W. Va. 514, 125 S. E. 374 (1924) (denying wife right to suit money under W. VA. REV. CODE (1931) c. 48, art. 2, § 13). Query whether this holding applies to all annulment suits or only to those where the marriage is void instead of voidable. And see *Chapman v. Parsons*, 66 W. Va. 307, 311, 66 S. E. 461 (1909). Note that under c. 48, art. 2, § 15, as amended by Acts 1935, c. 35, § 15, it is clear that no alimony may be awarded in an annulment suit, but the court may enter a decree as to custody and maintenance of children and may make such order effective by a decree concerning the estate of the parties. *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736 (1890).

⁶⁶ *Supra* at 34.

Our statute specifically sets out the relatives a person may not legally marry.⁶⁷ If the prohibited relationship was created by marriage, the prohibition continues despite the dissolution of the marriage on which the relationship is based.⁶⁸ Although a marriage in violation of these provisions is only voidable,⁶⁹ it cannot be affirmed. Because of the strong policy against such a union, an incestuous marriage will be annulled after many years of cohabitation even at the instance of one who knowingly entered into the marriage.⁷⁰ As in the case of other prohibited marriages, unless one of the parties sees fit to have it annulled during the lifetime of the other, an incestuous marriage will be treated as valid for all purposes. Both parties to such a marriage may, however, be subjected to criminal liability.⁷¹

(6) *Disability due to physical condition.* Although the parties are otherwise capable of contracting a valid marriage, they may be placed under a legal disability by reason of their physical condition. Thus, the West Virginia statute provides that

" . . . all marriages solemnized when either of the parties was . . . an epileptic, or was afflicted with a venereal disease, or was incapable, because of natural or incurable impotency of body, of entering into the marriage state, . . . shall be void from the time they are so declared by a decree of nullity."⁷²

A marriage voidable because of the impotency of one of the parties may not be annulled at the instance of a party who had knowledge of this fact at the time of the marriage.⁷³ Similarly, if the marriage is voidable because one of the parties was at the time of the marriage afflicted with a venereal disease, it may not be annulled by the party so afflicted if he has subsequently been cured, or by the other party if, after such cure, he has affirmed the marriage.⁷⁴

⁶⁷ W. VA. REV. CODE (1931) c. 48, art. 1, § 2 (relatives a man may not marry); c. 48, art. 1, § 3 (relatives a woman may not marry).

⁶⁸ W. VA. REV. CODE (1931) c. 48, art. 1, § 4.

⁶⁹ W. VA. REV. CODE (1931) c. 48, art. 2, § 1, "all marriages which are prohibited by law on account of consanguinity or affinity . . . shall be void from the time they are so declared by a decree of nullity."

⁷⁰ *Martin v. Martin*, 54 W. Va. 301, 46 S. E. 120, L. R. A. 1912C, 728n (1903) (marriage between nephew and aunt annulled after eighteen years cohabitation).

⁷¹ W. VA. REV. CODE (1931) c. 48, art. 1, § 18.

⁷² Acts 1935, c. 35, § 1, amending W. VA. REV. CODE (1931) c. 48, art. 2, § 1.

⁷³ W. VA. REV. CODE (1931) c. 48, art. 2, § 3(a).

⁷⁴ Acts 1935, c. 35, § 3(c), amending W. VA. REV. CODE (1931) c. 48, art. 2, § 3(c).

(7) *Miscegenation.* Marriages between a white person and a negro are prohibited and the white person who contracts such a marriage is subject to criminal liability.⁷⁵ Here again, however, the marriage is only voidable, and will be treated as valid until one of the parties sues for annulment.⁷⁶

(8) *Prior subsisting marriage.* There is one other situation where a marriage, though contracted by parties who could and did give the requisite consent, is nevertheless invalid because one of them was under a disability making it illegal for him to marry. It is, of course, illegal for a person to contract a second marriage if at the time he is already married, and one who does so is subject to prosecution for bigamy.⁷⁷ For present purposes, however, we are interested only in the question of the validity of the second marriage.

At common law such a bigamous marriage was wholly void even though contracted in good faith upon a reasonable belief that the former marriage had been dissolved by death or divorce. This was at one time the rule in West Virginia.⁷⁸ Under our present statute, however, a bigamous marriage is voidable only.⁷⁹ The fact that in this state such a marriage is voidable and not void has raised some interesting problems and has led to results which are surprising, to say the least.

In *Stedd v. Compensation Commissioner*⁸⁰ the plaintiff's claim as widow had been denied by the commissioner on the ground that at the time of her marriage to the deceased workman she had a husband living and undivorced, and that consequently she was not the widow of the deceased. Overruling this contention, the court held that the second marriage was only voidable, that since it had not been dissolved by a decree of nullity, it could not be collaterally attacked by the commissioner in this proceeding, and consequently that the widow was entitled to compensation.

However, the court did not reach this result without serious misgivings as to the necessary implications of such a holding. Due to the requirement that she must not be living separate from the

⁷⁵ W. VA. REV. CODE (1931) c. 48, art. 1, § 19.

⁷⁶ W. VA. REV. CODE (1931) c. 48, art. 2, § 1.

⁷⁷ W. VA. REV. CODE (1931) c. 61, art. 8, §§ 1 and 2.

⁷⁸ *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50 (1890).

⁷⁹ W. VA. REV. CODE (1931) c. 48, art. 2, § 1.

⁸⁰ 111 W. Va. 509, 163 S. E. 12, 80 A. L. R. 1424 (1932).

deceased at the time of the injury,⁸¹ there is not much danger that a woman might collect compensation for the death of two husbands. But there is real danger that she might under the rule of this case claim dower and other rights in the estates of two or even more husbands. In anticipation of this and similar absurdities to which the logical application of our statute would lead, the court prepared itself a loophole when it said:

“Of course an individual may be convicted of the crime of bigamy though there has been no decree of annulment. What effect such conviction would have upon the claim of the guilty party for compensation need not now be considered.”⁸²

Further, in the syllabus, instead of saying that the widow was entitled to compensation unless the bigamous marriage had been annulled, the court said she was so entitled in the absence of a “judicial determination” that the second marriage was bigamous.⁸³ Thus there is a possibility that the court would hold that a conviction for bigamy is such a judicial determination that the second marriage was bigamous as to be equivalent to the “decree of nullity” mentioned in the statute. Now it would seem to be too clear for argument that the legislature had in mind only a decree of annulment entered by a court of equity under its jurisdiction to annul or affirm marriages. But on the other hand, if it should be held that a conviction for bigamy was enough to make the second marriage void, the court probably ought not to be too severely criticized — there are times when a court is justified in resorting to spurious interpretation in order to give at least partial relief from the consequences of ill-advised legislative action.

Another loophole was left in connection with the question of the time when the second marriage may be attacked. So far we have assumed that all voidable marriages in this state may be questioned only in a direct proceeding for annulment brought by one of the parties during the lifetime of the other. This would again seem to be the clear intent of the statute. Were it not for the complications raised by the fact that in West Virginia bigamous mar-

⁸¹ W. VA. REV. CODE (1931) c. 23, art. 4, § 13. Note however that she might collect for both if she could bring herself within the rule of *Coletrane v. Compensation Commissioner*, 86 W. Va. 179, 103 S. E. 102 (1920) as to what constitutes not “living separate” under this statute.

⁸² *Sledd v. Compensation Commissioner*, 111 W. Va. 509, 511, 163 S. E. 12 (1932).

⁸³ *Id.* at 509.

riages are voidable, this would apparently be our rule, for in discussing the problem the court said:

"The general rule is that a voidable marriage is regarded as practically valid until its nullity is declared by a court of competent jurisdiction within the lifetime of the parties. . . .

"Where there exists the distinction of the common law and the canonical law between *void* and *voidable* marriages, the former may be attacked collaterally even after the death of one or both of the parties, but the latter may be attacked only within the lifetime of the parties. . . .

"Our statute has done away with this distinction."⁸⁴

If the court had said no more, the rule as stated above would be correct. It probably is correct in respect to all other voidable marriages. But the court, dissatisfied with this rule as applied to bigamous marriages, went on to say:

". . . . Under it (our statute) there is only one rule and it declares that the forbidden marriages shall be void from the time of decree of nullity. Code, 48-2-1. The query arises: When can this be done? Must it be done within the lifetime of the parties as under the common law rule pertaining to voidable marriages? If so, a bigamous spouse would share in the estate of the one to whom he or she had been unlawfully married. The right of the surviving spouse could not be challenged. This cannot be the intent of the law, certainly as to bigamous marriages. It would be unreasonable. A bigamous marriage should be open to attack, under our statute, even after the death of one or both of the parties, just as at common law, otherwise an innocent former spouse, or children of the decedent (not of the bigamous marriage), might be greatly wronged. . . ."⁸⁵

The court here had in mind a case in which the decedent left two or more wives surviving him, and they are all claiming a share in his estate or are claiming compensation for his death. In *Coletrane v. Compensation Commissioner*,⁸⁶ it was held that the first wife was entitled to compensation. Under the rule of the *Sledd* case, the second wife if she was living with the man at the time of the injury, could also collect. But aside from the compensation cases where this matter of cohabitation is important, it is clear

⁸⁴ *Id.* at 510-511.

⁸⁵ *Id.* at 511-512.

⁸⁶ 86 W. Va. 179, 103 S. E. 102 (1920).

that several widows would be entitled to share in the estate of their deceased husband.

Such a result is probably so unreasonable as to justify the court's reading into the statute an exception permitting collateral attacks on bigamous marriages. But if the collateral attack be allowed in order to prevent several wives from sharing in the estate of or collecting compensation for one husband, there is no logical reason why it should not also be allowed to prevent one wife from asserting claims in respect to several husbands.

Another entirely illogical result of the statute as it now stands is this: Although a second wholly bigamous marriage is only voidable, if the bigamous spouse goes to the trouble of getting a divorce, but marries again within the prohibited period⁸⁷ the second marriage is void *ab initio*.⁸⁸ Assuming the correctness of the rule that a wholly bigamous marriage is voidable, one would think that as an original proposition a bigamous marriage after a divorce but within the prohibited period would *a fortiori* be only voidable. Thus, the dissenting judges in *Hall v. Baylous* would seem to have the better of the argument. On the other hand, however illogical it may seem, one can readily understand the position of the majority who, being dissatisfied with the rule that bigamous marriages are voidable and wishing to escape the difficulties outlined above in at least this limited group of cases, availed themselves of the opportunity to declare such marriages within the prohibited period void.

The truth of the matter is that under the statute as it now stands it is impossible to deal with the matter logically. These cases cannot be put into the order of reason until the legislature sees fit to change the statute and go back to our former rule that all bigamous marriages are void *ab initio*. Such a change in our law would immediately put all these cases on the same basis, and would thus not only clear up the illogical muddle they are now in, but would also remove the difficulties which have been anticipated by the court. The legislature should never have enacted a rule so unworkable as to compel resort by the court to strained and spuri-

⁸⁷ W. VA. REV. CODE (1931) c. 48, art. 2, § 22 as amended by Acts 1935, c. 35, § 22.

⁸⁸ *Hall v. Baylous*, 109 W. Va. 1, 153 S. E. 293 (1930). Remarriage in violation of such prohibition raises conflict of laws problems which though interesting are beyond the scope of this article. In this connection see *McManus v. Commissioner*, 113 W. Va. 566, 169 S. E. 172 (1933); *Johnson v. Commissioner*, 116 W. Va. 232, 179 S. E. 814 (1935); Note (1927) 33 W. VA. L. Q. 207.

ous interpretation in order to avoid the undesirable results which would follow its logical application. But having done so, the least that the legislature can do would be to relieve the court of this necessity by amending our statute so as to make all bigamous marriages void instead of voidable.